FILED
AUG 22
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

v.

BRAD L. SIMMONS,
Respondent.

REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondent contends that Questions 1 and 3 of the petition, which challenge under the Due Process Clause the standardless discretion of juries to impose punitive damages in unlimited amounts and the lack of procedural safeguards for imposing such punishment, are not sufficiently substantial or important to warrant review by this Court. Respondent also challenges the adequacy of General American's presentation to the Alabama courts of Question 2—whether the imposition of liability for punitive damages in this case based upon a theory of *respondeat superior* violated the Due Process Clause. General American will address each of these arguments in turn.

1. Questions 1 and 3 of the Petition are Substantial and Worthy of this Court's Plenary Consideration.

Questions 1 and 3 of the petition are presently before the Court in another Alabama case, *Pacific Mutual Life Insurance Co.* v. *Haslip*, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990) (to be argued Oct. 3, 1990), which the court below viewed as dispositive of General American's federal constitutional challenges to the $600,000 punitive damage award in this case. Respondent repeats essentially verbatim many of the same arguments that were advanced by the respondent in *Pacific Mutual* in opposition to that petition.[1] But the grant of certiorari

[1] *Compare* Opp., at 13-26 *with* Respondent's Br. in Opp. *in Pacific Mutual*, at 11-21. Respondent in this case adds only one new argument to those advanced in *Pacific Mutual*, contending

in *Pacific Mutual* necessarily rejected those precise arguments. It is therefore *a fortiori* that the questions presented in General American's petition are substantial and worthy of review.[2]

2. Question 2, the Due Process Challenge to the Imposition of Punitive Damages Based upon the Theory of *Respondeat Superior*, was Properly Presented to the Alabama Courts.

Respondent does not dispute the importance of Question 2, contending instead that General American did not properly preserve in the Alabama courts its argument that the vicarious imposition of liability for punitive damages in this case violates the Due Process Clause. That contention is without merit.

First, in the case at bar the Supreme Court of Alabama expressly relied upon *Pacific Mutual* to dispose of General American's federal due process chal-

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that the Court should deny the petition because "[e]very state and federal court to have considered the question has . . . ruled that the common law method for assessing punitive damages satisfied due process." Opp., at 12. But the refusal of the lower federal and state courts to apply the Due Process Clause to control unlimited and excessive punitive damage awards, notwithstanding the recent statements of this Court (and individual Justices) regarding the serious constitutional implications of such punishment, is precisely why it is finally necessary for this Court to intervene. *See* Pet. for Cert., at 9-17 *in The Ohio Casualty Ins. Co.* v. *G. Amador Corp., pet. for cert. filed*, June 19, 1990 (No. 89-1986) ($10,000,000 punitive damage award).

[2] In fact, respondent concedes that Question 1 of the petition, whether the imposition of punitive damages "without statutory or common law standards" violates the Due Process Clause, Opp., at 23, has been "identified by this Court as worthy of consideration." *Id.*

lenges, noting that it "has consistently rejected the same arguments made by the defendants and has upheld the constitutionality of punitive damages." Pet., App. A, at 20a. In *Pacific Mutual*, the court below rejected the argument that the Due Process Clause precludes the vicarious infliction of punitive damages against a principal for the unauthorized actions of a purported agent, and left no doubt that it considered the vicarious liability issue to be part and parcel of a broader due process challenge to the standardless imposition of punitive damages.[3] Although General American filed its briefs in the court below prior to the issuance of the opinion in *Pacific Mutual*, it would have been a manifestly futile exercise for General American to have articulated a specific due process challenge to the *respondeat superior* theory of liability in that court separate from its more generalized due process attack on the punitive damage award.

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[3] After rejecting Pacific Mutual's Excessive Fines Clause challenge to punitive damages based upon this Court's decision in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), the court below disposed of Pacific Mutual's due process challenges by simply stating that "in a series of recent cases, this Court has rejected the remaining constitutional arguments submitted by Pacific Mutual." 553 So. 2d, at 543, *citing Industrial Chemical & Fiberglass Corp.* v. *Chandler*, 547 So. 2d 812 (Ala. 1988); *United American Ins. Co.* v. *Brumley*, 542 So. 2d 1231 (Ala. 1989); *HealthAmerica* v. *Menton*, 551 So. 2d 235 (Ala. 1989), *cert. denied*, 110 S. Ct. 1166 (1990); *Olympia Spa* v. *Johnson*, 547 So. 2d 80 (Ala. 1989). That "series of recent cases," which the court below also cited in this case, involved "fundamental fairness" challenges under the Due Process Clause to the standardless discretion of juries to impose punitive damages in unlimited and excessive amounts, *see, e.g.*, *Industrial Chemical*, 547 So. 2d, at 837, not specific challenges to the theory of *respondeat superior*.

Second, the *ad hoc* and subjective nature of Alabama's *respondeat superior* doctrine (*see* Pet., at 8-12) only serves to aggravate and compound the capriciousness and unpredictability that are the hallmarks of that State's punitive damage regime.[4] At every stage of the proceedings below, General American challenged under the Due Process Clause the vague and elastic "standards" upon which Alabama juries are permitted to impose liability for punitive damages and the resulting arbitrariness of that system. *See* Pet., at 4-6. Question 2 of the petition may well be more specific, but it is certainly "within the clear intendement" of General American's broader Due Process Clause challenge to the standardless Alabama punitive damage system and therefore within this Court's jurisdiction. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *see, e.g.*, *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982); *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Braniff Airways, Inc.* v. *Nebraska State*

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[4] Contrary to respondent's assertion (Opp., at 1-2), the Supreme Court of Alabama did not affirm General American's vicarious liability for punitive damages based upon a finding that the insurance agent from whom respondent's wife attempted to purchase a policy actually was an "employee" of General American rather than an independent agent as specified in the contract between the agent and General American. The court below simply found that because General American "had authority to hire and fire its agents, to determine the methods by which they were trained, to issue its company training manuals, and to pay its agents their commissions," vicarious punishment was appropriate under "the facts of [this] case," Pet., App. A, at 9a-10a, even though General American concededly had not authorized, approved, or ratified the allegedly fraudulent conduct of the agent in this case.

Board of Equalization and Assessment, 347 U.S. 590, 598-99 (1954).

Finally, although framed as a separate question in the petition, General American's *respondeat superior* argument is, at most, "only an enlargement," *Dewey* v. *Des Moines*, 173 U.S. 193, 197 (1899), of its argument in the courts below that the trial court and jury in this case had "no defined standard by which to assess punitive damages" (Pet., App. E, at 40a), thus producing an "arbitrary imposition" of punitive damages against General American in violation of due process. *Id.*, at 45a. This Court has long recognized that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey*, 173 U.S., at 197-98; *e.g.*, *Stanley* v. *Illinois*, 405 U.S. 645, 658 & n.10 (1972) (although the precise issue was not raised in the courts below, the issue could be considered in this Court because it involved the same "constitutional premise raised below" and the "method of analysis [was] readily available to the state court"); *see also Pruneyard Shopping Center*, 447 U.S., at 85-86 n.9; *Illinois* v. *Gates*, 462 U.S. 213, 248 & n.2 (1983) (White, J., concurring in the judgment) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of . . . a federal claim be raised and decided below."). Thus, General American's failure in the court below to articulate in any specific formulation its constitutional objections to the vicarious nature of the punishment should not preclude it from doing so in this Court.